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IN THE

Supreme Court of the United States

October Term, 1968
No. 1030

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Federal Rules and Regulations Involved	2
Questions Presented	2
Statement	3
Reasons for Granting Writ	10
Conclusion	12

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	1
Appendix B. The Common Varieties Act of July 23, 1955	4
Appendix C. Title 43—Public Lands: Interior	5
Appendix D. 5 U.S.C.—Chapter 5—Administrative Procedure Act	7

TABLE OF AUTHORITIES CITED

Cases — Page

Best v. Humbolt Placer Mining Company, 371 U.S. 334 7

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 9

Keyishian v. Regents of New York University, 385 U.S. 589 10

Medway, Ex parte, 90 U.S. 504 .....3, 6

United States v. Coleman, et al., 390 U.S. 599 .....3, 4, 9, 10

Zwickler v. Koots, 389 U.S. 241 10

Statutes

Code of Federal Regulations, Title 43, Sec. 3511.1-(a) 2, 4

Code of Federal Regulations, Title 43, Sec. 3511.1-(b) 2, 4

United States Code, Title 5, Sec. 500 2

United States Code, Title 5, Sec. 552 .....2, 4, 5, 6, 7, 9, 12

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 30, Sec. 21 2

United States Code, Title 30, Sec. 161 .....2, 4, 5, 11

United States Code, Title 30, Sec. 611 2

United States Constitution, Art. I 2

United States Constitution, Art. II 2

United States Constitution, Art. V 2

United States Constitution Art. XIV 2

Textbooks Page

2 Lindley on Mines, Third Edition, Sec. 381, p. 899 10

Mr. Justice Black, Columbia University School of Law, March, 1968, A Constitutional Faith, p. 8 11

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UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, particularly Alfred Coleman, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dated December 4, 1968.

Opinion Below.

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered December 4, 1968. A copy thereof is appended to this petition at Appendix pages 1-3 hereof.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

A motion to stay the mandate was issued by the United States Court of Appeals for the Ninth Circuit until January 25, 1969, for filing this petition for writ of certiorari.

Constitutional Provisions, Statutes and Federal Rules and Regulations Involved.

Articles I and II of the United States Constitution.

The pertinent portions of Article V of the United States Constitution and Article XIV of the Amendments thereto.

The Mining Laws of the United States, as amended, 30 U.S.C. Sections 21, *et seq.*, particularly Section 161, The Building Stone Act of 1892.

The Administrative Procedure Act of the United States, 5 U.S.C., Chapter 5, Sections 500, *et seq.* (formerly Chapter 19, Sections 1001, *et seq.*), especially Section 552 thereof.

The Common Varieties Act of July 23, 1955, 30 U.S.C. Section 611.

Rules and regulations of the Department of the Interior relating to mining, particularly 43 C.F.R. 3511.1-(a) and (b).

Questions Presented.

1. Was it proper for the Court of Appeals for the Ninth Circuit by its Order dated December 4, 1968, to refuse to rule on the issues presented to it in our Petition for Hearing or Rehearing, dated June 17, 1968, because that Court felt it had no discretion under the mandate sent to it by this Court with its decision of April 22, 1968?

In his concurring opinion Chief Judge Chambers makes the following comment:

> "There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 Fed. 2d 190) for which I retain my fondness." (Emphasis added)

2. Has Alfred Coleman been denied his constitutional rights, and particularly due process, by the administrative proceedings in the Department of the Interior and in the Court reviews thereof?

Statement.

I.

This petition grows out of the decision of this Court in the case of *United States v. Coleman, et al.,* dated April 22, 1968, 390 U.S. 599.

A copy of that decision was sent to the United States Court of Appeals for the Ninth Circuit, containing the following mandate:

"* * * The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision."

In its decision in the case of *Ex parte Medway,* 90 U.S. 504, at pages 506-507, this Court stated:

"Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts appearing in the record sent to us upon the appeal, the judgment was erroneous. *In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding.*" (Emphasis added).

As there were several questions involved in this case which were not passed upon by the Supreme Court in its decision of April 22, 1968, and as several other questions arose because of that decision, Coleman, *et al.* filed a petition with the United States Court of Appeals for the Ninth Circuit to consider and determine the following questions:

(a) Does the stone covered by the Coleman mining claims have a property or properties giving it "distinct and special value" under 30 U.S.C. Section 161, as pointed out as necessary by the Supreme Court of the United States in its decision of April 22, 1968?

(b) This Court decided that the Common Varities Act applied to the Coleman mining claims because of a dictionary definition submitted by the attorneys for the United States that quartzite is a most common stone. The Court of Appeals for the Ninth Circuit was asked in our petition to determine whether the definition of common varieties by the Department of the Interior dated September 7, 1962, and published in 27 Federal Register on September 14, 1962 (43 C.F.R. 3511.1(a) and (b)) exclude the building stone on the Coleman mining claims from the definition of common varieties? (See Appendix B, page 4 hereof).

(c) This Court in its opinion of April 22, 1968, found that the so-called "marketability at a profit" test was a logical complement to the old "prudent man" rule. Since this Court did not determine whether the "marketability at a profit" rule had been properly promulgated by the Department of the Interior, the United States Court of Appeals for the Ninth Circuit was asked by us to determine that question because the Administrative Procedure Act, 5 U.S.C., Chapter 5, Sec-

tion 552 requires that an addition to current regulations must be published in the Federal Register so that the public will be fully apprised of such "amendment or revision." Therefore, if the marketability at a profit "complementary" rule was not so published, we asked that the United States Court of Appeals for the Ninth Circuit declare said "complementary" rule invalid.

(d) The United States Court of Appeals for the Ninth Circuit was asked to determine whether the rule of "marketability at a profit" was unconstitutional because it is vague, indefinite and uncertain.

II.

(a) In its decision of April 22, 1968, this Court determined, based upon the unsupported suggestions of the attorneys for the Department of the Interior, that Section 161 of the mining laws was "* * * entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under Section 611)."

As the meaning of Section 161 of the mining laws was not an issue in the contest hearing or any appeals thereof within the Department of the Interior, there was no evidence before this Court from which it could determine either of the following questions:

> "(1) What is the special type of building stone still covered by Section 161?
>
> (2) Was and is the building stone on Mr. Coleman's mining claims of the type specified by this Court?

To ascertain these facts the case should be returned to the Department of the Interior for further hearing

and we so requested the United States Court of Appeals for the Ninth Circuit. That Court felt it had no discretion under your mandate.

(b) This Court in its decision of April 22, 1968, stated that the "marketability at a profit" rule used by the Department of the Interior against Mr. Coleman was a "logical complement" to the "prudent man" rule. This Court had not been informed that the "marketability at a profit" rule had not been properly promulgated by the Department of the Interior by publication in the Federal Register, as required by the Administrative Procedure Act (5 U.S.C. Section 552). See Appendix D, page 7 hereof.

Research has revealed that the "marketability at a profit" rule had never been published in any edition of the Federal Register, and it has not been published in any of the documents issued by the Department of the Interior for the information of the members of the public who desired to locate mining claims.

We, therefore, asked that this question be ruled on by the United States Court of Appeals for the Ninth Circuit.

It, therefore, would appear that the decision of this Court, dated April 22, 1968, should be modified as to the mandate sent to the United States Court of Appeals for the Ninth Circuit, in accordance with the prior decision of this Court in the case of *Ex parte Medway,* 90 U.S. 504, 506-507, from which we quote above, to permit these questions to be considered and determined by the United States Court of Appeals for the Ninth Circuit.

(c) While the attorneys for the Department of the Interior claimed in their Brief to this Court after cer-

tiorari was granted that the "marketability at a profit" rule has been used as a discovery test for a long time, they offer no proof and the facts do not sustain that statement. The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States several times, one of the latest decisions being *Best v. Humbolt Placer Mining Company,* 371 U.S. 334 (January 4, 1963). There is no reference in that decision by this Court to "marketability at a profit." Since this Court held that the "marketability at a profit" rule was a "logical complement" to the old "prudent man" rule, it comes within Section 552 of the Administrative Procedure Act, which provides in part as follows: "* * * each amendment, revision or repeal of the foregoing must be published in the Federal Register."

Further proof that "marketability at a profit" was not used until recently is evidenced by a pamphlet issued by the House Committee on Interior and Insular Affairs covering a hearing held by the Subcommittee on Friday, February 1, 1957. This report covers a hearing before that Committee growing out of alleged abuse by the Department of the Interior in the administration of the Common Varieties Act which was passed July 23, 1955. Various employees of tte Department of the Interior testified that the Department did not require a showing of profit to find a claim to be valid under that law.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time almost every year. They are entitled "Lode and Placer Mining Regulations." Mr. Coleman procured one such pamphlet be-

fore he started his first locations in 1949. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit." One pamphlet is entitled: "Mining Claims; Questions and Answers." It is dated 1963. We quote from the bottom of page 3 thereof and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. *Commercial grade ore is not required* but mere traces, isolated bits of mineral or minor indications are not sufficient to satisfy the 'prudent man' rule." (Emphasis added).

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit." We call attention to the following language in the above quotation:

> "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit."

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

Further, attention is called to the following provisions contained in Section 552 of the Administrative Procedure Act, 5 U.S.C.:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Until such time as the Department of the Interior complies with the Administrative Procedure Act and publishes its regulations defining "marketability at a profit," it is improper and illegal to apply that test to the Colemnan mining claims.

(d) In addition the "marketability at a profit" rule is unconstitutional because it is vague, indefinite and uncertain.

What does "market" mean?

What does "profit" mean?

How should any prospector know while he is operating what will be declared by the Department of the Interior to be a market and what will be declared to be a profit?

This Court has repeatedly declared laws invalid because they are vague and uncertain. One of the latest cases was a decision rendered by this Court on April 22, 1968, the same date that the *Coleman* decision was rendered; the case is *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676.

Another decision on this point was issued by this Court during the 1967 Session, being:

Zwickler v. Koots, 389 U.S. 241.

See also:

Keyishian v. Regents of New York University, 385 U.S. 589 (1967).

Many other decisions could be cited, but the rule is too well known to need elaboration.

Reasons for Granting Writ.

1. The constitutional rights of Mr. Coleman have been denied by the misinterpretation of the mining laws by the Department of the Interior.

2. There is a long-established rule of laws that the mining laws shall be liberally construed in favor of the mining prospector (See Lindley on Mines, Third Edition, Volume II, page 899, section 381). This rule has not been applied in this *Coleman* case.

3. The administration of the mining laws by the Department of the Interior in recent years, and particularly in the *Coleman* case, is contrary to the laws as "passed and intended" by Congress. Such administration is attempted legislation; therefore, is unconstitutional. This is proven by the various recent decisions, and is clearly admitted in an address by H. R. Hockmuth, then Associate Director of the Bureau of Land Management, in an address delivered July 17, 1964, before the Rocky Mountain Mineral Law Institute. The address appears in Volume 10 of the proceedings of

that organization, beginning at page 467. Following are excerpts from that address:

> "There can be no gainsaying that the Mining Law of 1872 is not administered as it was originally written and intended . . ." (p. 473).
>
> "The result is that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making . . ." (p. 489).

4. The Department of the Interior misinterpreted section 161 of the mining laws (The Building Stone Act, 30 U.S.C. 161), which was very plain and simple and, therefore, there was no need or legal authority for interpretation. The rule against such interpretation of laws is clearly stated by Mr. Justice Black in a series of lectures on the Constitution delivered by him before the Columbia University School of Law in March, 1968. The lectures have been recently published in a book entitled. "A Constitutional Faith." At page 8 we read:

> "Of course I realize 'that it is a constitution we are expounding.' But this does not mean that in order to obtain results thought to be desirable at the time, judges may rewrite our basic charter of government under the guise of interpreting it . . ."

Again, on page 20, near the bottom of the page, Mr. Justice Black continues: ". . . The courts are given power to interpret the Constitution and *laws,* which means to explain and expound, not to alter, amend, or remake . . ." (Emphasis added)

5. The 1955 Common Varieties Act was wrongly applied to Mr. Coleman's mining claims because they

were located many years before the 1955 law was passed and, therefore, excluded from that law by its terms.

6. The additional rule for discovery of "marketability at a profit" which this Court states is complementary to the "prudent man" rule, was not published in the Federal Register as required by the Administrative Procedure Act, 5 U.S.C. Section 552. It is, therefore, illegal.

The so-called "marketability at a profit" rule was never published in any of the pamphlets issued by the Department of the Interior for the purpose of informing the public of the General Mining Regulations.

7. The "complementary" rule of "marketability at a profit" is unconstitutional because it is vague and indefinite.

Conclusion.

For the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari be granted and that the case be sent back to the United States Court of Appeals for the Ninth Circuit with a mandate instructing that Court to return the case to the Department of the Interior for further hearing, in accordance with the mining laws and the instructions of this court.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Alfred Coleman and Edward J. McClennan, *Appellants,* vs. United States of America, *Appellee.* No. 20,-227.

ORDER

[December 4, 1968]

Before: CHAMBERS and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM:

The mandate of the Supreme Court of the United States in this case declares:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in conformity with the opinion of this Court."

The Opinion of that Court referred to in the mandate states: "* * * [W]e hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail."

The judgment of the District Court from which this appeal was taken orders, adjudges and decrees:

"1. That the plaintiff, United States of America, is declared to be the sole owner of all right, title and

interest in the lands described herein to the exclusion of any right, title or interest in any asserted mining claims or mining locations of the defendants herein.

"2. That the counterclaim of the defendant Alfred Coleman herein be, and hereby is dismissed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants herein, their agents, and others acting in concert with or participating with them, are each and all,

"1. Restrained and enjoined from using, occupying or maintaining any structures, equipment or other personal properties on the land described in the complaint herein and set forth in detail in the answer of defendants.

"2. Restrained and enjoined from entering upon, or being upon said lands for the purpose of using and occupying the same pursuant to any asserted mining claims of said defendants, or of either of them, or for the purpose of operating or using any claimed mining locations thereon, or for the purpose of doing any acts or things thereon related to or claimed to be related to said mining claims or mining locations.

"3. Restrained and enjoined from interfering with, impeding, obstructing, or resisting plaintiff, United States of America, its officers or employees, departments or agencies, in any acts or things done or to be done in the exercise of the United States' complete control and dominion over said lands, upon condition that the defendants have 60 days from final judgment on appeal or otherwise, within which to remove or otherwise dispose of structures or any other property on said lands; and

"4. That each party shall bear its costs of suit herein."

This judgment is in complete conformity with the mandate and opinion of the Supreme Court.

Appellant has moved for a hearing or rehearing, hoping that this Court will find in the mandate of the Supreme Court room for discretion to award a new trial or new hearing either in the administrative procedure in the Department of the Interior or before the District Court to determine issues not explicitly discussed and disposed of by the Supreme Court. We find no such ambiguity or flexibility in the mandate and opinion from the Supreme Court. Accordingly,

IT IS ORDERED that the Judgment entered by the United States District Court, Southern District of California, Central Division (now the Central District of California) on February 25, 1965, is affirmed.

CHAMBERS, Circuit Judge, concurring:

There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 F.2d 190) for which I retain my fondness.

APPENDIX B.

The Common Varieties Act of July 23, 1955.

Title 30 U.S.C. 611: (July 23, 1955, c. 375, sec. 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652.)

Sec. 611. COMMON VARIETIES OF SAND, STONE, GRAVEL, PUMICE, PUNICITE, OR CINDERS, AND PETRIFIED WOOD

No deposit of common varieties of sand, stone, gravel, pumice, punicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity *to any mining claim hereafter located under such mining laws: Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common Varieties" as used in sections 601, 603 and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the placement of wood by silica or other matter. (Emphasis added.)

The following sections of the Act also limit the law to "mining claim hereafter located". Sec. 612(a)(b)(c).

Section 615 contains provisions protecting the rights of claimants of mining claims located prior to the passage of the Common Varieties Act on July 23, 1955.

APPENDIX C.

APPENDIX C.

Title 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

SUBCHAPTER A—MINERAL LANDS

[Circular No. 2039]

PART 185—GENERAL MINING REGULATIONS

Common Varieties: Defined

Paragraph (b) of § 185.121 is revised in its entirety as follows (and the footnote 2 is deleted):

§ 185.121 *Common varieties: defined.*

• • • • •

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commerical value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

JOHN A. CARVER, Jr.,
Acting Secretary of the Interior.

SEPTEMBER 7, 1962.

[F.R. Doc. 62-9184; Filed, Sept. 13, 1962; 8:46 a.m.]

(Emphasis added)

Published in 27 F.R. September 14, 1962 - Effective upon publication.

APPENDIX D.

5 U.S.C.—Chapter 5—Administrative Procedure Act.

§522. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of olicy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this

paragraph to be made available or published. (A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.